Editor's note: 91 I.D. 331

STATE OF ALASKA

v.

MARCIA K. THORSON

STATE OF ALASKA

v.

PHYLLIS WESTCOAST

(ON RECONSIDERATION)

IBLA 83-191(D) Decided October 22, 1984

Reconsideration of the decision of the Board of Land Appeals appearing at 76 IBLA 264 (1983) and styled as above (IBLA Docket No. 83-191, BLM Docket Nos. AL 81-5-P, AA-7208; AL 81-6-P, AA-7307) by the Director, Office of Hearings and Appeals.

Reversed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Valid Existing Rights

   An applicant for a Native allotment who has satisfied the requirements of the Alaska Native Allotment Act of 1906 possesses a valid existing right.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands

   The Department of the Interior does not retain jurisdiction to hear a contest brought by the State of

Alaska against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State following commencement of the Native's use and occupancy. Subsection 906(c)(1) of the Alaska National Interest Lands Conservation Act, confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where title to lands tentatively approved to the State of Alaska is conveyed to the State pursuant to the Alaska National Interest Lands Conservation Act, the Department of the Interior, although it loses jurisdiction over said lands, has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate.

APPEARANCES: Craig J. Tillery, Esq., Trey Eyerly, Esq., David Fleurant, Esq., Geoffrey T. Comfort, Esq., and Joel Bolger, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for contestees; Claire Steffens, Esq., M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Limited.

OPINION BY PAUL T. BAIRD, DIRECTOR

On October 18, 1983, the Interior Board of Land Appeals (IBLA) ruled upon an interlocutory appeal of an order of Administrative Law Judge E. Kendall Clarke denying a motion of the Bureau of Land Management (BLM), joined by the State of Alaska (State), to dismiss for lack of jurisdiction

private contests brought by the State against two Native allotment applicants. The Board held in State of Alaska v. Thorson, 76 IBLA 264 (1983), that the Department of the Interior (Department) retains jurisdiction to adjudicate a contest brought by the State against applicants for Native allotments pursuant to the Alaska Native Allotment Act (1906 Act), Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1982)), where the lands sought by the Natives were tentatively approved to the State following commencement of the Natives' use and occupancy. It was held that subsection 906(c)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c)(1) (1982), providing for confirmation of all tentative approvals of State land selections subject to valid existing rights, does not convey the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

On December 5, 1983, the State requested the Director, Office of Hearings and Appeals (OHA), to reconsider the Board's decision. The State was supported by BLM in a pleading submitted February 21, 1984. Marcia K. Thorson and Phyllis Westcoast (contestees) responded to the State and BLM in pleadings submitted January 19 and March 12, 1984, respectively, opposing the requests for reconsideration and supporting IBLA's decision. Contestees were in turn supported by Doyon, Limited, amicus curiae herein, by a letter submitted February 27, 1984. By order of April 2, 1984, the Director, OHA, assumed jurisdiction over the cases pursuant to 43 CFR 4.5(b) and granted the request for reconsideration.

As pointed out by the Board, there is no dispute about the facts:

> On November 15, 1970, Phyllis Westcoast applied for a Native allotment (AA 7307) in two parcels of land under the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1976)). She alleged use and occupancy of the lands since August 1960. On May 2, 1961, the State filed a general purpose grant selection covering the land claimed by Westcoast. Because Westcoast's application was not of record until 1972, the United States on September 3, 1963, tentatively approved a State selection of land covering Westcoast's parcel B. On May 18, 1976, BLM approved Westcoast's application in its entirety and rescinded its tentative approval of lands covering parcel B. [BLM's actions were subsequently set aside by IBLA in State of Alaska, 41 IBLA 315, 86 I.D. 361 (1979), thereby returning the parties to the status quo ante. 1/] On March 20, 1980, pursuant to options set forth in State of Alaska, 41 IBLA 315 (1979), the State filed the above-captioned private contest against Westcoast for parcel B. No contest has been brought against lands forming parcel A of Westcoast's application.
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> In 1971 Marcia K. Thorson applied for a Native allotment (AA 7208) in one parcel of 160 acres, alleging use and occupancy since May 1960. On May 19, 1961, the State filed a general purpose grant selection covering the land claimed by Thorson. Again, because the Native allotment application was not of record until 1972, the State selection was tentatively approved on September 3, 1963. On May 5, 1976, BLM approved Thorson's application and rescinded the State's tentative approval as to that land. [As above, BLM's actions were set aside in State of Alaska, 41 IBLA 315 (1979).] The State's contest against Thorson was filed on March 20, 1980. [Footnotes omitted.]

State of Alaska v. Thorson, 76 IBLA at 265-66 (1983).

This case turns on the meaning of the phrase "subject only to valid existing rights" in subsection 906(c)(1) of ANILCA. The subsection provides:

> (c) Prior Tentative Approvals -- (1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and Native selection rights under the Alaska Native Claims

1/ Thus, the tentative approvals were restored and the Native allotment applications were "held for approval" by BLM, subject to private contest, among other options, by the State. See State of Alaska, 41 IBLA 309 (1979).

> Settlement Act, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval; except that this subsection shall not apply to tentative approvals which, prior to the date of enactment of this Act [Dec. 2, 1980], have been relinquished by the State, or have been finally revoked by the United States under authority other than authority under section 11(a)(2), 12(a), or 12(b) of the Alaska Native Claims Settlement Act. [Emphasis added.]

In support of their motions to dismiss, their appeals to the Board, and their petitions for reconsideration, the State and BLM argue that (1) subsection 906(c)(1) operated as an immediate legislative conveyance of legal title to lands tentatively approved (TA'd) to the State pursuant to the Alaska Statehood Act; (2) "subject only to valid existing rights" are traditionally, and were intended by Congress to be, words of qualification or limitation, i.e., words which do not diminish the quantum of the estate that passes, but subject it, or make it subservient, to superior claims of others; (3) title to lands claimed by Native allotment applicants and TA'd to the State was thus conveyed to the State; and (4) the Department thereupon lost jurisdiction to determine title to such claims. The Board agreed with contestees, however, holding that "subject only to valid existing rights" in subsection 906(c)(1) are words of exception, thereby excepting lands claimed in Native allotment applications from conveyance to the State, and thus, preserving title and jurisdiction in the Department.

The Board based its decision upon (1) the treatment of the "subject to valid existing rights" phrase in withdrawal orders, where such rights or claims have consistently been held to have survived such orders, and (2) the continuing exercise of jurisdiction by BLM over Native selection rights under

the Alaska Native Claims Settlement Act (ANCSA), also the object of the "subject only to" language in subsection 906(c)(1) of ANILCA, wherein BLM has continued to rescind tentative approvals that conflict with such selections after passage of ANILCA. The Board also relies upon the legislative history of ANILCA, pointing out that its purpose, to resolve Alaska's uncertain land ownership status, would not be furthered by conveyance to the State of Native allotment application claims within the boundaries of TA'd lands.

For the reasons set forth below I agree with the positions set forth by the State and BLM and hold that the Department has no jurisdiction to hear or adjudicate the contests at issue.

[1] At the outset it should be pointed out that there is no essential disagreement among the parties, Administrative Law Judge Clarke, or the Board that the Native allotment claims at issue are "valid existing rights" as contemplated in subsection 906(c)(1). I agree. Pursuant to Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909, 912 (1981), "valid existing rights" as used in public land law are described as follows:

> "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied. Compare Stockley v. United States, 260 U.S. 532, 544 (1923) with Wyoming v. United States, 255 U.S. 489, 501-02 (1921) and Wirth v. Branson, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secre-tarial discretion.
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> Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has

> made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. [Footnote omitted.]

The Solicitor continues by pointing out that "[v]alid existing rights are not, however, absolute," but are defined by the statute creating them. Id. Thus, "the right preserved is to an adjudication and, if the adjudication is favorable, to [fee title]." 2/ Id., 88 I.D. at 912 n.5.

The status of a Native claim allotment applicant is similar to that of a mining claimant. A Native applicant who has satisfied the requirements of the 1906 Act "has a valid existing right by his actions under the statute." Id. As held by the court in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Congress did not intend to give the Secretary unfettered discretion under the 1906 Act, but intended "the Act as a means of granting to the Alaska Natives land to which, on compliance of certain conditions, they would become entitled." Id. at 140. "An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land * * *." Id. at 142. To the same effect is Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

[2] The words "subject to" in conveyances have ordinarily been interpreted to mean "subordinate to," subservient to," "limited by," or "charged

2/ The term used in the quotation is "a lease." The language also applies to a claim or application which may ripen into fee title. In the latter case the claimant usually has a continuing right to possession, at least until the claim is extinguished upon adjudication.

with." They do not connote a reservation or retention of property rights in the grantor. Thus, they are terms of limitation or qualification, putting the grantee on notice that he may be receiving less than a fee simple. Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1981); Bradshaw v. Lower Colorado River Authority, 573 S.W.2d 880 (Tex. 1978); Hedin v. Roberts, 16 Wash. App. 740, 559 P.2d 1001 (1977); Renner v. Crisman, 80 S.D. 532, 127 N.W.2d 717 (1964); Moore v. Gillingham, 22 Wash. 2d 655, 157 P.2d 598 (1945); see Texaco, Inc. v. Pigott, 235 F. Supp. 458, 463 (S.D. Miss. 1964); State v. Willburn, 49 Hawaii 651, 426 P.2d 626, 630 (1967). As the Alaska court points out in Hendrickson, supra at 209, there are a few cases interpreting this phrase as reserving an interest in the grantor, but they are exceptions to the general rule and usually involve facts which indicate that the intent of the grantor was to exclude the interest in property from the conveyance. See, e.g., Lutz v. McLain, 538 P.2d 472 (Colo. 1975). Ultimately, it is the intent of the parties that controls.

The language of subsection 906(c)(1) leaves little doubt that it was intended to constitute an immediate legislative conveyance of all previously TA'd lands. The "such lands" to which all right, title, and interest of the United States are deemed to have vested in the State of Alaska are "[a]ll tentative approvals." (Emphasis added.)

Examination of the legislative history of section 906 of ANILCA supports the conclusion that Congress intended that legal title to lands claimed under the 1906 Act and included within previously TA'd lands pass to the State immediately:

> Section 906: State Selections and Conveyances
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> This section provides for: certain amendments to the Alaska Statehood Act, * * * confirmation and vesting of title of prior tentatively approved (TA'd) lands, * * * [and] impression of valid existing rights and Native selection rights under the ANCSA on lands conveyed to the State * * *.

S. Rep. No. 413, 96th Cong., 1st Sess. 287, reprinted in 1980 U.S. Code Cong. & Ad. News 5231. The language of subsection 906(c)(1) was approved by the Senate Committee on Energy and Natural Resources over the objections of two Senators that it would provide congressional confirmation of "illegal State selections," id. at 430, and would "give the State the upper hand in dealing with the Department of the Interior on conveyances of existing State selections * * *." Id. at 426. Similar objections were voiced by dissenting members of the House Interior and Insular Affairs Committee. H.R. Rep. No. 97, 96th Cong., 1st Sess. 557. While dissenters sometimes tend to draw exaggerated inferences, it is clear that subsection 906(c)(1) was intended by its proponents and seen by its opponents as an immediate conveyance of legal title to all TA'd land to the State.

This conclusion is also supported by subsection 906(1) of ANILCA, 43 U.S.C. § 1635(1) (1982), entitled "Existing Rights," which provides, in material part:

> (1) All conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights * * *.
>
> (2) * * * Upon issuance of tentative approval, the State shall succeed and become entitled to any and all interests of the United States as contractor, lessor, licensor, permittor, or grantor, in any * * * contracts, leases, licenses, permits,

> rights-of-way, or easements, except those reserved to the United States in the tentative approval. [3/]

As to the interests (i.e., valid existing rights) enumerated in subsection 906(1) and embraced by a tentative approval, Congress clearly intended to transfer all of the underlying right, title, and interest of the United States to the State. Moreover, it demonstrated that it intended a difference between "subject to valid existing rights" and "except those reserved." Congress clearly distinguished between the Federal Government's interests in those rights to which TA'd lands were subject and those interests "reserved to the United States." Legal title to the former was conveyed to the State; legal title to the latter remained in the United States.

As in subsection 906(c)(1), Native allotment claims are not mentioned in subsection 906(1). The question is whether Congress intended the same treatment to apply to such "valid existing rights." The answer, according to past Departmental practice, is yes. In implementing the statutory language of subsection 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), 4/ which is similar

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3/ The less-than-fee interests enumerated by Congress in subsection 906(1) as "existing rights" comport with the Solicitor's definition of "valid existing rights." "[A]lthough the Secretary is not required to approve an application for a right-of-way, if an application is approved [or a lease is issued] the applicant has a valid existing right to the extent of the rights granted." Solicitor's Opinion, M-36910 (Supp.), 88 I.D. at 912.

4/ Subsection 14(g) reads in relevant part as follows:

> "All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United

to that of subsection 906(1) of ANILCA, the Department distinguished between entries leading to acquisition of title, such as claims under the 1906 Act, and those of a temporary or limited nature, such as those enumerated in subsection 906(1). Pursuant to 43 CFR 2650.3-1(a) 5/ the former are to be excluded from conveyances to Native corporations, the latter included. Nevertheless, BLM has not treated interests leading to acquisition of title as excluded automatically by "subject to" language in the instrument of conveyance. To the extent such interests were not expressly identified and excluded in patents or interim conveyances issued pursuant to subsection 14(g) of ANCSA, BLM has treated legal title to the affected land as having been conveyed and has sought reconveyance from the patentee. 6/

This is precisely what the State and BLM propose here regarding subsection 906(c)(1) conveyances of TA'd land to the State. Because the claims at issue here and indeed most, if not all, of the pending Native allotment claims were not applied for until well after BLM approved State applications

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fn. 4 (continued)
States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State."

5/ "Pursuant to section 14(g) * * * of the act, all conveyances issued under the act shall exclude lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases * * *, contracts, permits, rights-of-way, or easements."

6/ This is also the effect of Secretarial Order No. 3029, 43 FR 55,287 (Nov. 27, 1978), which approves the distinction in 43 CFR 2650.3-1(a), identifies open-to-entry leases as entries leading to acquisition of title, and concludes that they "should be excluded from Native conveyances." Id. at 55,288. Here again, to the extent such entries are specifically identified and expressly excluded in the interim conveyance, legal title remains in the United States. If, however, they are not so identified and excluded, title passes and reconveyance must be sought.

for tentative approval, they were not known and thus not identified or excluded from the TA'd lands. Upon congressional confirmation and conveyance of those TA'd lands to the State in subsection 906(c)(1), title passed and now reconveyance must be obtained in order that the Department might adjudicate claims leading to acquisition of title.

As pointed out by the State and BLM, all conveyances to the State under ANILCA and to Native corporations under ANCSA are expressly "subject to valid existing rights" (State of Alaska's Memorandum in Support of the Request for Reconsideration at 3-7; Response of BLM to the State of Alaska's Request for Reconsideration at 7-9). Similarly, subsection 6(b) of the Alaska Statehood Act, 72 Stat. 339, 340 (1958), provides: "That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied." Moreover all patents issued by BLM contain and have contained similar language. In part 1862.11 of the BLM Manual, entitled Patent Preparation and Issuance, Illustrations 1 and 2 are of sample patents. Both contain "subject to" language. At page 2 of Illustration 1 it is instructed: "'Subject to any vested and accrued rights therein' is a standard clause."

It has been consistently held by the Department that patents subject to valid or vested rights convey legal title to the land described except for lands expressly identified and excluded. In Harry J. Pike, 67 IBLA 100 (1982), the Board affirmed BLM's refusal to accept a mining claim for recor- dation on lands patented to the State under the Alaska Statehood Act. In

Clarence March, 3 IBLA 261 (1971), and Peter Andrews, Sr., 77 IBLA 316 (1983), the Board held that the Department retained no jurisdiction to adjudicate Native allotment claims to lands patented to the State of Alaska and lands conveyed to a Native corporation by interim conveyance, respectively. Thus, the Board's distinguishing of Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), in its decision below is in error. In Ethel Aguilar, 15 IBLA 30 (1974), the Board affirmed BLM's rejection of Native allotment applications on the ground that the Department had no further jurisdiction to adjudicate such applications where the lands applied for were patented to the State under the Alaska Statehood Act. The patent contained language protecting valid existing claims. The court did not dispute the Board's holding that title had passed, but held, relying upon Pence v. Kleppe, supra, that the Department's deciding not to recover the land without first holding a fact-finding hearing was arbitrary and capricious and remanded the case to the Department. 7/ The Board distinguished Aguilar from the instant case on the ground that

> the land sought by the Native allotment applicants [in Aguilar] had been given to the State of Alaska and under the rules of the Department of the Interior, the land was no longer in Federal ownership and the Department had no jurisdiction to make further disposition of the land. * * * In * * * Thorson-Westcoast, however, patent to the land sought by the Native allotment applicants has not passed to the State * * *.

76 IBLA at 272 n.7. The effect of subsection 906(c)(1) of ANILCA on legal title is the same as the effect of a conveyance by patent. If patent subject

7/ Some 3-1/2 years later the court approved stipulated procedures providing for informal hearings before BLM and, if BLM approved the applications, recovery of the land from the State.

to valid existing rights conveyed legal title to lands impressed with those rights in Aguilar, the legislative conveyance in subsection 906(c)(1) of ANILCA, subject to the same rights, did so here.

The Board relied heavily on the interpretation of "subject to valid existing rights" in withdrawal cases. 76 IBLA at 269-72. Its reliance is misplaced. These cases involve Executive orders withdrawing public lands from entry under the public land laws. The Board correctly cited authority for the proposition that where land is withdrawn subject to valid existing rights or claims, the right or claim is not extinguished, and the withdrawal takes effect as to lands covered by such entries only upon their termination. Stockley v. United States, 260 U.S. 532 (1923); James F. Rapp, 60 I.D. 217 (1948); Solicitor's Opinion, 55 I.D. 205 (1935); Emma H. Pike, 32 L.D. 395 (1902). Neither the State nor BLM disagrees. The issue before us is not survival of Native allotment claims within TA'd lands, upon which all parties agree, but who owns the subservient legal title to such lands. In withdrawal cases legal title to lands covered by valid entries remains in the Department. Thus, there is no issue as to its jurisdiction to adjudicate the validity of such claims, and the authorities cited are inapposite to the jurisdictional question here.

An analogous jurisdictional question was presented to the court in Arnold v. Morton, 529 F.2d 1101 (9th Cir. 1976). There a conflict arose as to the Department of the Interior's continued jurisdiction over Federal land vis-a-vis that of another Federal agency. The question was whether Exec. Order No. 3797-A, establishing Naval Petroleum Reserve No. 4 in 1923 and

transferring jurisdiction from the Department of the Interior to the Department of the Navy, "created certain islands of land within the exterior perimeter of the Reserve [which] were excluded from the withdrawal." Id. at 1103. The order "'set apart as a Naval Petroleum Reserve all of the public lands within the following described area not now covered by valid entry, lease or application * * *.'" Id. (emphasis in original). Contrasting the emphasized language above with the withdrawal of "'all lands * * * subject to valid existing rights'" in the orders of withdrawal creating Naval Petroleum Reserves Nos. 1 and 2 in 1912, the court held that the "not now covered" language connoted an intent that the property involved was excluded from the withdrawal, i.e., never became part of it, while the "subject to" language was appropriate where there was an intent to withdraw all of the land within the exterior boundary of the designated area. Id. (emphasis in original). The court stated:

> From these authorities the conclusion is inescapable that within the Department of Interior there has existed since at least 1879 an awareness of the distinction between withdrawals which included all tracts within designated exterior lines and those which excluded one or more islands within such exterior lines. Moreover, these sources indicate that, while withdrawals without regard to their language could not extinguish existing rights derived from previous appropriations, total inclusion generally was achieved by use of a description of the exterior lines accompanied by language expressing the thought in one way or another that the withdrawal was subject to valid existing rights. On the other hand, the exclusion of tracts within exterior lines was evidenced by reasonably explicit language. While the language of Exec. Order No. 3797-A is not as explicit * * * as it might be, it is plainly unlike that used in the Orders creating Reserves No. 1 and No. 2 as well as that generally used to indicate total inclusiveness. We must presume that this difference was intended to serve a purpose and we believe the purpose was to exclude from Pet. 4 those tracts "not now covered by valid entry, lease or application."

> We, therefore, conclude that the Secretary of the Interior did have jurisdiction over the ["not now covered"] lands in question. [Emphasis added; footnotes omitted.]

Id. at 1105.

The Board also based its decision upon BLM's continuing exercise of jurisdiction after ANILCA over Native selection rights, also the object of "subject only to" in subsection 906(c)(1), wherein BLM rescinded tentative approvals in favor of conflicting village selections. Those actions by BLM are not on appeal and need not be addressed. I am persuaded, nevertheless, that there is justification for treating Native allotment claims differently from Native selection rights under ANCSA. There is no preexisting legislation relating to the former which would lead one to conclude that "subject only to" was intended to have any meaning other than its ordinary meaning in relation to such claims. The same cannot be said, however, with respect to the latter. An express purpose of ANILCA was to implement ANCSA. Subsection 11(a)(2) of ANCSA, 43 U.S.C. § 1610(a)(2) (1982), withdrew certain State-selected and tentatively approved lands surrounding Native villages for selection by such villages pursuant to subsection 12(a)(1) of ANCSA, 43 U.S.C. § 1611(a)(1) (1982). The two statutes should be construed harmoniously, if possible. To construe the "subject only to" language in subsection 906(c)(1) of ANILCA as conveying lands which had been withdrawn by ANCSA would constitute an implied repeal of the ANCSA provisions. Such repeal by implication is not favored by the law. As pointed out in Kenai Peninsula Borough v. State of Alaska, 612 F.2d 1210, 1213-14 (9th Cir. 1980), aff'd sub nom. Watt v. Alaska, 451 U.S. 259 (1981):

> However, when a plain meaning reading of a statute brings that statute into conflict with another statute and disrupts a preexisting network of statutory provisions, it is appropriate to look to the legislative history for help in ascertaining congressional intent. [Citations omitted.] * * * This is especially true when the face of the statute gives no indication of a congressional intent to repeal existing legislation or of a purpose, the accomplishment of which might require superseding prior statutes.
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> * * * * * * *
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> * * * Repeal by implication, however, is not favored; if possible, statutes should be read so as to give effect to each of them. [Citations omitted.] This is the preferred course especially when, as here, the purpose and legislative history of the later act gives no clear foundation for an implied repeal. [Footnote omitted.]

Considering the two statutes in this manner, BLM's practice of rescinding tentative approvals on lands covered by ANCSA withdrawals on an ongoing, ad hoc basis in connection with the continuing village selection process under ANCSA after ANILCA seems to be appropriate.

For the reasons given above, I conclude that subsection 906(c)(1) of ANILCA was intended to, and did, convey legal title to Native allotment claims within TA'd lands from the United States to the State of Alaska. Thus, the Department no longer possesses jurisdiction over such lands and has no authority on its own to affect title thereto. West v. Standard Oil Co., 278 U.S. 200, 211 (1929); Germania Iron Co. v. United States, 165 U.S. 379 (1897); Moore v. Robbins, 96 U.S. 530 (1877); United States v. Stone, 69 U.S. 525, 535 (1864); Peter Andrews, Sr., supra; Harry J. Pike, supra; Clarence March, supra; State of Alaska, 45 IBLA 318 (1980); Everett Elvin Tibbets, 61 I.D. 397 (1954); Heirs of C. H. Creciat, 40 L.D. 623 (1912); Mary E. Coffin, 34 L.D. 298 (1905).

The Department's loss of jurisdiction is implicitly recognized in subsection 906(i) of ANILCA, 43 U.S.C. § 1635(i) (1982), which reaffirms the duty of the Secretary to adjudicate conflicting claims to lands selected under authority of the Alaska Statehood Act "prior to the issuance of tentative approval." (Emphasis added.)

[3] This does not mean that Native allotment claimants are without a remedy or that the Department has no duty toward them. The Department does have a duty based on its special relationship to Alaskan Natives and its responsibility under the 1906 Act to make a preliminary determination as to the validity of Native allotment applications and to pursue recovery of land where appropriate through negotiation with the State or litigation. This duty is recognized in subsection 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), which provides that allotment applications to TA'd lands "shall be adjudicated pursuant to the requirements of the Act of May 17, 1906."

The situation here is in many respects similar to that which existed in Aguilar v. United States, supra, and the procedures which were stipulated to in that case might be appropriate in this type of case as well. 8/ Since BLM has already approved the allotment applications at issue here, it may be most expeditious for BLM, upon dismissal of the contests, to refer the cases to the Solicitor for appropriate action.

8/ I do not necessarily endorse the implementation procedures stipulated to by the parties in Aguilar as the best procedures for dealing with this type of claim. Both the Aguilar decision and Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), permit some flexibility in meeting due process requirements.

Accordingly, the decision of the Board is reversed. The cases are remanded to Administrative Law Judge Clarke with instructions to dismiss the contests for lack of jurisdiction and to return the records to BLM for action consistent with this opinion.

Paul T. Baird
Director